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IN THE

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1939.

No. 1.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

WILSHIRE OIL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

RESPONDENT'S PETITION FOR REHEARING.

JOSEPH D. BRADY,
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Of Counsel:
EDGAR LEWIS.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

	PAGE
Respondent's petition for rehearing	1
Certificate of counsel	8

TABLE OF AUTHORITIES CITED.

	PAGE
General Counsel's Memorandum 2315, released Sept. 26, 1927	2, 3, 4, 6
Ilfeld v. Hernandez, 292 U. S. 62	5
Revenue Act of 1928, Sec. 23(1)	4
Revenue Act of 1928, Sec. 141(a)	5
Revenue Act of 1939, Sec. 215(a) (9) (B)	5
Treasury Decision 4025, dated June 18, 1927	2, 3, 4, 6

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RESPONDENT'S PETITION FOR REHEARING.

Respondent respectfully shows:

1. Mr. Justice Douglas delivered the opinion of this Court on November 6, 1939. Time for filing this petition was extended to December 9, 1939.

2. Respondent will not seek herein to argue against the wisdom of this Court's broad approval of the Commissioner's contention (Petitioner's Brief, p. 19) that where earlier regulations have been issued under identical statutory provisions, and where such regulations have unambiguously covered the situation, then nevertheless the

Commissioner is empowered to issue different regulations under a later statute *provided* such new regulations operate *with prospective effect only.*

3. Respondent does respectfully urge, however, that this Court's determination that the regulations did not apply with retroactive effect upon the respondent was due to the circumstance that this Court was not fully aware of the facts and their proper significance.

4. The rationale of decision appears to be that the regulations in question did not affect respondent retroactively because (a) respondent "was afforded ample opportunity to make a new election"; (b) "there is no reasonable basis for concluding that when respondent made its second election in 1927 it had no basis for assuming that the policy * * * was or would be no different"; and (c) that "in terms of equitable considerations respondent has no just ground of complaint" (Opinion, pp. 5, 6). These conclusions were in turn based upon the premise that G. C. M. 2315, released on September 26, 1927, so modified and enlarged the scope of the election afforded by Treasury Decision 4025, dated June 18, 1927 (which decision "contained no notice of any projected change"), as to include within the scope of such election a regulation which is diametrically opposed to that then in effect and which was not promulgated *in the manner required by the statute or at all* until fourteen months after the opportunity to elect had expired. The premise upon which the conclusions are based, we respectfully submit, is untenable either logically or factually.

We believe this Court, when it arrived at its decision, was, very excusably, not fully aware of one extremely important fact not shown in the printed record and disclosed

by the Commissioner for the first time only after oral argument for the respondent had been concluded. We refer to the letter addressed to the Solicitor General by the Commissioner, dated October 6, 1939, which this Court permitted the Commissioner to file at the oral argument. The language of its opinion herein shows that this Court overlooked the statement in the Commissioner's letter that G. C. M. 2315 (not promulgated until September 26, 1927) was actually in existence on May 27, 1927—22 days *prior* to the issuance of T. D. 4025. From this indisputable fact only one conclusion may be fairly drawn: when the Commissioner, with approval of the Secretary, promulgated T. D. 4025 on June 18, 1927, without any mention therein of any proposed change in the regulations, those authorized officials thereby placed the stamp of disapproval upon the possible change attempted to be "foreshadowed" by the General Counsel's Memorandum. We reject, and believe this Court will reject, the possible but unwarranted alternative conclusion that the Commissioner and Secretary, when T. D. 4025 was released, contemplated a change in the regulations but deliberately concealed that intention from taxpayers in the hope that taxpayers would allow the period within which a different option might be made to elapse without taking action.

We also believe that this Court, when it arrived at its conclusion, was not fully aware of the following pertinent facts: (a) no reasonably prudent man who had determined upon a negative course of action in June, 1927, after fully considering the terms of and the basis for the new election offered by T. D. 4025, would consider, upon reading G. C. M. 2315 some three or four months later—if indeed he read it at all—that such memorandum in any way re-

quired a reconsideration of his decision in connection with the option; (b) in a great many cases it would be a physical impossibility for a taxpayer to file the two amended returns required by T. D. 4025 in the short period of time between September 26th and December 18th, 1927. The Commissioner evidently considered that six months was necessary for a taxpayer to prepare amended returns for two years.

The foregoing facts become pertinent only if it is assumed (1) that all taxpayers are required to subscribe to some tax service or other means of obtaining General Counsel's Memoranda "hot off the press" (the Cumulative Bulletin containing G. C. M. 2315 was not printed until 1928, *after* the period within which the taxpayer might have made a new election had already expired); (2) that taxpayers, as a matter of law, are put on notice that rules and regulations, required by Congress to be approved by the Secretary, Sec. 23(1) of the Revenue Act of 1928, may be modified by a General Counsel's Memorandum, not approved by the Commissioner or the Secretary; and (3) that taxpayers must act today with reference to possible changes in administrative policy "foreshadowed" in a General Counsel's Memorandum released some seventeen months before the change in policy is adopted by the only two officials authorized by Congress to make rules and regulations.

This taxpayer also had every right to rely upon the fact that it has been the established legislative policy of Congress, and, until this case arose, the established admin-

istrative policy of the Commissioner and Secretary, to grant new elections to taxpayers when there occurred a change in the law or the regulations, respectively, with reference to which the taxpayer had theretofore entered into a binding election covering future years. This established policy is illustrated by Treasury Decision 4025 itself and also by the history of the capital stock and complementary excess-profits tax statutes. Congress has even gone further and expressly provided, in certain instances, that where an election is provided for by statute, the tax payer is bound *only* by the regulation "prescribed *prior* to the making of such return." Cf. Sec. 141 (a) of the Revenue Act of 1928; Sec. 215(a) (9) (B) of the Revenue Act of 1939. These specific examples show that, in the Congressional mind, taxpayers, bound by a prior election, are entitled to a new one even though prospective, but different, regulations prescribed after the first election was made, do "not purport to reach back to earlier years" (Opinion, p. 4).

Where a taxpayer has made an election pursuant to permission granted by the Regulations, this Court has likened the legal effect of such action to the contractual relationship. See *Ilfeld v. Hernandez*, 292 U. S. 62, 65. But respondent does not ask this Court to go so far in this case. Respondent does not urge the adoption of the contract theory with all of its possible impairment of the administrative process. It has now been determined by the opinion herein that the Commissioner may issue *pros-*

pective regulations which are not in harmony with prior regulations under identical prior statutes. It is undoubtedly true that "experience, changing needs, changing philosophies inevitably produce constant change" (Opinion, p. 4). That fact, however, need never clash with principles of fair dealing. Nor does that conclusion require that a taxpayer, who has made an election in reliance upon the then existing practice, be foreclosed from the opportunity to make a new election when the Commissioner determines to issue new regulations which adversely affect the taxpayer. Nor can the granting of such a new election possibly cause the administrative process to bog down. We are confident that this Court will not accept a contrary view, from which it would necessarily follow, that a taxpayer must never bind himself, by making an election, without full realization of the fact that while the hands of agreement are still moist from the contact of understanding, there may fall the "black-jack" of "changed rules" from which he has no escape. This Court will not cast upon the Department a stigma arising from the inference that the bludgeon of G. C. M. 2315 was actually raised in departmental hands when the obviously fair new election contained in T. D. 4025, which gave no notice of any projected change, was proffered.

In fairness to the Commissioner and Secretary, we must record our conviction that at no time did those officials entertain the thought that T. D. 4025, released on June 18, 1927, should be construed so as to constitute an

offer of a new election in connection with Treasury Regulations not to be promulgated until some twenty months later.

We believe the Treasury in turn will admit that the ability to offer taxpayers alternative methods of treatment in border-line cases, the choice of which depends upon ever-changing circumstances, contributes as much as any other factor to the elasticity, speeding up and effectiveness of the administrative process. A decision adverse to the position of the respondent in this case will unnecessarily restrict this essential administrative requirement. Unless respondent's position is sustained, few taxpayers will adopt in the future a course of action to which they are permanently bound when faced with the knowledge that without an opportunity to make a new election, their tax obligations may be enormously increased. We also believe that the Treasury will admit that no decrease in effectiveness or adaptability will result to the administrative process if the taxpayer is given the right to make a new election where the Regulations are changed in such manner as to work unforeseeable hardship upon the taxpayer.

We therefore earnestly request this Court to determine (a) that where regulations with reference to which a taxpayer has made a binding election are subsequently changed in such manner as adversely to affect him, such taxpayer is entitled to an opportunity to make a new election; and (b) that in this case no such opportunity to make a new election was afforded the respondent. We

further earnestly represent that such a determination will redound to the benefit of the public good in such measure as to make infinitesimal the possible tax liability involved in this case.

Wherefore, with profound respect for the judgment of this Court, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals for the Ninth Circuit be, upon further consideration, affirmed.

Respectfully submitted,

JOSEPH D. BRADY,
Counsel for Respondent,
458 South Spring Street,
Los Angeles, California.

Of Counsel:
EDGAR LEWIS.

November 30, 1939.

Certificate of Counsel.

I, Joseph D. Brady, counsel for the above-named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOSEPH D. BRADY,
Counsel for Respondent.

PP. 3,5,.

SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Wilshire Oil Company, Inc.	On Writ of Certiorari to United States Circuit Court of Appeals, Ninth Circuit.

[November 6, 1939.]

Mr. Justice Douglas delivered the opinion of the Court.

This case presents the question whether respondent, Wilshire Oil Company, Inc., in computing its net income for the years 1929 and 1930 for the purpose of applying the 50 per cent limitation on depletion allowance under § 114(b)(3) of the Revenue Act of 1928 (45 Stat. 791), may refuse to take as deductions certain development expenditures,[1] where it has deducted those development expenditures in computing its taxable net income for those years. The Board of Tax Appeals held for the respondent (35 B. T. A. 450) and that decision was affirmed by the Circuit Court of Appeals, one judge dissenting (95 F. (2d) 971). Because of the importance of the problem of the scope of the Commissioner's rule-making power and because of an asserted conflict of the decision below with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner of Internal Revenue* v. *F. H. E. Oil Co.*, 102 F. (2d) 596, we granted certiorari.

Respondent is engaged in the business of producing oil and gas from its various properties. In computing taxable net income in its returns for 1929 and 1930 respondent, pursuant to the regulations, deducted development expenditures in the respective amounts of $606,051.66 and $279,927.04. But it refused to make those deductions in determining its "net income . . . from the property"

[1] These expenditures consisted of such items as labor, fuel and power, materials and supplies, tool rental, truck and auto hire, repairs to drilling equipment and depreciation upon equipment used in drilling.

for the same years, when computing allowable depletion under § 114(b)(3) of the Revenue Act of 1928.[2]

That section provides:

"In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

By virtue of § 23 of the Revenue Act of 1928 companies like respondent were allowed as deductions in computing net income a "reasonable allowance for depletion . . . according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary." Pursuant to that rule-making power the phrase "net income of the taxpayer (computed without allowance for depletion)" as used in § 114(b)(3) was defined by Treasury Regula-

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[2] For the year 1929 the Commissioner's computations were as follows:

Gross Income from the properties		$1,001,375.17
Deductions: Production expense	$171,399.03	
Development expense	606,051.66	
Total expenses		777,450.69
Net income from property (computed without allowance for depletion)		$223,924.48
50 percent of that income		$111,962.24

The Commissioner limited the depletion allowance to the last mentioned figure since 50 per cent of the net income from the property as thus computed was less than 27½ per cent of the gross income.

Under the taxpayers computation, the net income for depletion purposes would be $1,001,375.17 less $171,399.03 or $829,976.14 and 50 per cent thereof would not be less than 27½ per cent of the gross income.

For the year 1930 the Commissioner's computation showed a loss of $194,869.22. He therefore ruled that since the percentage depletion allowance was limited to 50 per cent of the net income from the properties and since the taxpayer had no such net income, no deduction on account of percentage depletion could be allowed. The taxpayer refused, however, to deduct development expenses in the application of the 50 per cent limitation and claimed a depletion deduction of $42,528.91, arrived at as follows:

Gross income from the properties	$370,448.72
Deductions: Production expense	285,390.90
Net Income	$85,057.82
Depletion deduction (50 per cent of net income)	$42,528.91

tions 74, Art. 221(i) promulgated under the 1928 Act as meaning "gross income from the sale of oil and gas" less certain deductions including "development expenses (if the taxpayer has elected to deduct development expenses) . . . but excluding any allowance for depletion". For 1925 respondent, having the option to treat these expenses as deductions for development expenses or as charges to the capital account returnable through depletion,[3] chose the former.

On these facts it would seem that Treasury Regulations 74, Art. 221(i) would require respondent to deduct development expenses in computing "net income" as used in § 114(b)(3), since respondent fell clearly within the class described therein.

But respondent contends that these regulations as applied to it for the taxable years in question are invalid. Its argument runs as follows: (1) The phrase "net income . . . from the property" present in § 114(b)(3) originated in § 234(a)(9) of the Revenue Act of 1921 (42 Stat. 227) and was reenacted without change in § 204(c) of the 1924 Act (43 Stat. 253). It was also carried over into § 204(c)(2) of the 1926 Act (44 Stat. 9), when Congress adopted the present so-called percentage depletion formula. Shortly after the enactment of the Revenue Act of 1921, Treasury Regulations were issued defining net income . . . from the property" as meaning gross income from the property less "operating expenses".[4] A similar definition was given in the Treasury Regulations issued under the Revenue Act of 1924.[5] The admitted Treasury practice under those two Acts was to permit net income from the property to be computed without regard to development expenditures. Hence, respondent argues, the meaning of the phrase "net income . . . from the property" had acquired a plain and definite meaning, known to the Congress; thus when that phrase was reenacted in the 1924 Act, the Congress intended it to have the meaning which administrative practice had given it. And, the argument continues, that meaning having been adopted by the Congress in the 1924 Act, it clung to the same phrase in the

[3] Treasury Regulations 69, Art. 223, promulgated under the Revenue Act of 1926 provides that "such incidental expenses as are paid for . . . development of the property may at the option of the taxpayer be deducted as a development expense or charged to capital account returnable through depletion. . . . An election once made under the provisions of this article will control the taxpayer's returns for all subsequent years."

[4] Treasury Regulations 62, Art. 201(h).

[5] Treasury Regulations 65, Art. 201(h).

1926 Act[6] and in the 1928 Act, especially since the Commissioner prior to February 15, 1929[7] never did undertake by regulation or decision to give that phrase a meaning different from that which had been consistently applied under the earlier Acts.

(2) Secondly, respondent contends that the fact that it deducted development expenses in computing taxable net income does not mean that it is required to make the same deductions for the "net income" computation under § 114(b)(3) for the reason that it had no free choice in the first of these computations. In that connection it points out that it was required to make these deductions from gross income by reason of its election in its 1925 return to treat these expenses as deductions for development expenses rather than as charges to capital account returnable through depletion, an election binding for all subsequent years. In that posture of the case it argues that the attempted change in the regulations here involved has a retroactive effect, as applied to it, and withdraws one of the important inducements offered by the Commissioner in connection with the election which respondent made in its 1925 return.

We do not think that respondent's position is tenable.

As to respondent's claim of retroactivity, it is true that the election made in connection with its 1925 return was known to be binding for all subsequent years. It is likewise true that it was made at a time when Treasury practice did not require deduction of development expenses in making the computation under § 114(b)(3). But that is no basis for a claim of retroactivity. Treasury Regulations 74, Art. 221(i) which required the deduction of development expenses for the purpose of the computation under § 114(b)(3) were issued February 15, 1929 under the 1928 Act. These regulations applied prospectively only and did not purport to reach back to earlier years when the taxpayer relied on a different rule or practice. Tax statutes and tax regulations never have been static. Experience, changing needs, changing philosophies inevitably produce constant change in each. One making an elec-

[6] Respondent points to the Report of Committee on Ways and Means on Revenue Bill of 1926 (H. Rep. No. 1, 69th Cong., 1st Sess., p. 6): "The discovery depletion deduction limitation of an amount not in excess of 50 per cent of the net income of the taxpayer from the property upon which discovery was made, provided in existing law, is retained in this provision."

[7] The date when Treasury Regulations 74, Art. 221(i), here in question, were promulgated.

tion in the 1925 return took the risk that the method of treatment of depletion might be changed by the Congress, or, where power existed, by the Commissioner. Any other conclusion would make the application of changes pursuant to regulations, though prospective, dependent on fortuitous circumstances under which each taxpayer made such an election. Rigidity, as well as confusion, in administration of tax laws would be the result.

But in this case there is another answer to respondent's claim that an inequity results by changing the regulations after it had made its election in the 1925 return. On June 18, 1927, the Commissioner, with the approval of the Secretary, issued a Treasury Decision[8] stating that "In view of the change in the basis for depletion provided by the Revenue Act of 1926, in the case of oil and gas wells, taxpayers may make a new election as to the treatment" of development expenditures "for taxable periods ending on or after January 1, 1925, but not later than six months after the date of this decision." Taxpayers desiring to make a new election were required to file amended returns for the taxable periods involved within six months from the date of that decision. Thus respondent, after Congress adopted the new percentage depletion provision, was afforded ample opportunity to make a new election. This it did not do. To be sure that Treasury Decision contained no notice of any projected change in the meaning of "net income . . . from property" as used in § 114(b)(3). But in September 1927 there issued a General Counsel's Memorandum[9] in which it was stated that thereafter "if a taxpayer elects to treat development expenditures as ordinary and necessary business expenses . . . . in computing taxable net income, such expenditures must be deducted in determining the net income from the property, which amount is used as a limitation in computation of the depletion allowance based on income". To be sure this was merely an opinion of the General Counsel of the Bureau and did not have the force or effect of a Treasury Decision. Yet in view of such ruling, there is now no reasonable basis for concluding that when respondent made its second election in 1927 it had no basis for assuming that the policy as respects "net income . . . from the property" under the 1926 Act was or would be no different than it had been under the 1921 and

[8] Treasury Decision 4025, Cum. Bul. VI-1, p. 75.
[9] G. C. M. 2315, Cum. Bul. VI-2, p. 21.

1924 Acts. Therefore, in terms of equitable considerations respondent has no just ground of complaint. On these facts substantial justice requires that respondent take such burdens as may flow from its election along with the benefits.

Irrespective of these considerations, we think the regulations in question were valid. It is true, as stated by respondent, that the regulations under the 1921 Act provided that the "net income . . . from the property" should be computed for purpose of the depletion allowance without regard to development expenditures. And it may be assumed that that administrative construction received legislative approval by the reenactment of the statutory provision in the 1924 Act, without material change. Cf. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466. But that does not mean that that meaning survived both the 1926 and the 1928 Acts. In the first place, there were no comparable regulations under the 1926 Act.[10] In fact, the Commissioner undertook under that Act to follow the practice later set forth in the regulations here in question. See *Ambassador Petroleum Co.* v. *Commissioner*, 81 F. (2d) 474. Those facts are of some significance here for they refute the suggestion that the Congress in enacting the 1928 Act was giving approval to an administrative construction which had been given to comparable provisions of earlier Acts but which was abandoned before the passage of the 1928 Act. The more reasonable inference seems to be that reenactment of the provision in question by the 1928 Act at a time when Treasury policy as respects its construction had changed did nothing more than to restore to the phrase "net income . . . from the property" its original ambiguity.

[10] As respects discovery depletion in the case of mines under the 1926 Act, provisions similar to those under the 1921 and 1924 Acts were retained. Treasury Regulations 69, Art. 204(h). But this was not true as respects oil and gas wells. § 204(c)(2) of the Revenue Act of 1926 applied the percentage depletion allowance exclusively to "oil and gas wells". Treasury Regulations 69, Art. 221, provided:

"Under section 204(c)(2), in the case of oil and gas wells, a taxpayer may deduct for depletion an amount equal to 27½ per cent of the gross income from the property during the taxable year, but such deduction shall not exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. In no case shall the deduction computed under this paragraph be less than it would be if computed upon the basis of the cost of the property or its value at the basic date, as the case may be. In general, 'the property,' as the term is used in section 204(c)(2) and this article, refers to the separate tracts or leases of the taxpayer."

Thus, it is apparent that the delimitation implied in the permission to deduct "operating expenses" present under the earlier regulations disappeared from the 1926 regulations in case of oil and gas wells.

Accordingly that phrase became peculiarly susceptible to new administrative interpretation. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110; *Morrissey* v. *Commissioner of Internal Revenue*, 296 U. S. 344.

But in any event, the validity of the regulations in question seems clear. The oft-repeated statement that administrative construction receives legislative approval by reenactment of a statutory provision, without material change (*United States* v. *Dakota-Montana Oil Co.*, *supra*) covers the situation where the validity of administrative action standing by itself may be dubious or where ambiguities in a statute or rules are resolved by reference to administrative practice prior to reenactment of a statute; and where it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power. It does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers. Cf. *Morrissey* v. *Commissioner of Internal Revenue*, *supra*, at p. 355. The contrary conclusion would not only drastically curtail the scope and materially impair the flexibility of administrative action; it would produce a most awkward situation. Outstanding regulations which had survived one Act could be changed only after a pre-view by the Congress. In preparation for a new revenue Act the Commissioner would have to prepare in advance new regulations covering old provisions. Their effectiveness would have to await Congressional approval of the new Act. The effect of such procedure, so far as time is concerned, would be precisely the same as if these new regulations were submitted to the Congress for approval. Such dilution of administrative powers would deprive the administrative process of some of its most valuable qualities—ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations. It would make the administrative process under these circumstances cumbersome and slow. Known inequities in existing regulations would have to await the advent of a new revenue act. Paralysis in effort to keep abreast of changes in business practices and new conditions would redound at times to the detriment of the revenue; at times to the disadvantage of the taxpayer. Likewise the result would be to read into the grant of express administrative powers an implied condition that they were not to be exer-

cised unless, in effect, the Congress had consented. We do not believe that such impairment of the administrative process is consistent with the statutory scheme which the Congress has designed.

The only remaining question is whether Treasury Regulations 74, Art. 221(i) were within the power of the Commissioner to promulgate. That they were seems clear beyond question. We are not dealing here, as was this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, *supra*, with regulations applied retroactively. These are applied prospectively only. The rule-making power here in question may be found in § 23(l) of the Revenue Act of 1928. That section, after providing that companies like respondent were entitled, as a deduction in computing net income, to a "reasonable allowance for depletion . . . according to the peculiar conditions in each case" laid especial emphasis on the power of the Commissioner to make rules for the computation of the depletion allowance, by providing that "such reasonable allowance in all cases is to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary".

Respondent does not strongly urge that the regulatory power conferred by § 23(l) does not extend to the percentage depletion allowance under § 114(b)(3). Rather the contention seems to be that to allow the Commissioner by regulation to change the measure of "net income . . . from the property" from time to time, especially in the manner here attempted, would be to approve a result equally as contrary to the intention of Congress as if he had attempted by regulation to change the percentage factors themselves. But the scope or importance of the change effected by the regulations is immaterial if the power to promulgate such regulations exists. Here the Congress has not prescribed a precise formula free from all ambiguity. The ambiguous phrase "net income . . . from the property" was susceptible of various meanings and hence administrative interpretation of it was peculiarly appropriate, as we have said. And there were special reasons growing out of the complex nature of the depletion problem as it is treated for purposes of the income tax, for requiring the Commissioner to make precise the vague elements of that formula. In its general aspects under revenue acts depletion is a problem on which taxpayers, government and accountants have expressed a contrariety of opinions.[11] Obfuscation in attempted application of its princi-

[11] 2 Paul & Mertens, The Law of Federal Income Taxation (1934), ch. 21; 47 Yale L. Journ. 806 (1938).

ples under income tax laws has frequently been the result. The Congress itself, as revealed in the history of the revenue acts, has expressed varying philosophies. In practical administration of any one statute there are admittedly borderline cases between deductible business expenses and non-deductible capital outlays. On specific fact situations the clear line between depletion, depreciation, and obsolescence often becomes blurred.[12] What those lines are or should be is for the Congress and the Commissioner. Experience and new insight can be expected to produce rather constant change. In sum, the highly technical and involved factors entering into a practical solution of the problem of depletion in administration of the tax laws points to the necessity of interpreting § 23(l) so as to strengthen rather than to weaken the administrative powers to deal with it equitably and reasonably. These considerations are persuasive here not only in reaffirming the conclusion that the rule-making power existed, but also in concluding that restrictions on that power should not be lightly imposed where the incidence of such rules as are promulgated is prospective only.

Reversed.

Mr. Justice BUTLER and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[12] See for example the issues posed in United States *v.* Dakota-Montana Oil Co., *supra*.